

U.S. Department  
of Transportation

United States  
Coast Guard



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United States Coast Guard  
National Pollution Funds Center

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Mr. Ray Beittel  
Offshore Operations & Safety Management  
Minerals Management Service  
U.S. Department of the Interior  
Herndon, Virginia 20170

RE: Draft MMS COFR Regulations

Dear Mr. Beittel:

Thank you for providing the National Pollution Funds Center (NPFC) a copy of the Minerals Management Service's draft regulation respecting the presentation of direct action claims against the guarantors of certain offshore facilities under the Oil Pollution Act. 33 U.S.C. 2716 (as amended by Section 1125(a)(2) of the 1996 Coast Guard Authorization Act). As you know, the NPFC is pleased to be of assistance to MMS as it carries out its responsibility to promulgate this regulation. We believe it is particularly important that MMS ensure consistency between its proposed regulation and the general claims regulations issued by the Coast Guard under OPA. 33 CFR Part 136.

This letter will serve to begin the process of coordination on the "direct action regulation" (DAR). In respect of Part 253 of the DAR, as currently drafted, we would make the following comments and observations:

1. The NPFC views the new direct action requirements set forth in the amendment of Section 1016 of OPA, as establishing conditions precedent to the direct assertion of a claim against guarantors of offshore facilities. Where these conditions precedent apply, and once they are satisfied, claims against responsible parties, guarantors, and/or the Fund, should proceed as set forth in 33 USC 2713 and 33 CFR 136. As we see it, the DAR should establish a process for determining whether the conditions precedent are satisfied, not a process for how claims should be presented after such a determination has been made. This view would ensure that claimants will follow the existing claims regulation, where appropriate, without contradiction by the DAR. Accordingly, we suggest that the DAR begin by stating that, "Except as provided in [the remainder of the DAR], all claims shall be presented in accordance with Section 1013 of OPA and the claims regulations contained at 33 CFR Part 136". These regulations apply only to claims against guarantors pursuant to Section 1016(f)(2)".

2. In a further effort to ensure consistency between the DAR, on the one hand, and OPA and the existing claims regulations, on the other, we suggest that definitions of key terms in the DAR be by reference to the OPA definitions. For example, the terms "claim" and "claimant" can be defined as having the same meaning as provided in OPA, 33 USC 2701. Additionally, we recommend the use of the term "responsible party" rather than the term "designated applicant", because it would conform the DAR to OPA and existing claims regulations. Use of the term "designated applicant" is inconsistent with OPA and will generate confusion.

3. We do not understand the basis for the 45 day "wait periods" contained in Sections 253.51(b) and (c) of the DAR. Where a responsible party denies all liability for a claim, OPA does not require a 90 day waiting period before a claimant may elect to commence an action in court against the responsible party and guarantor or present a claim to the Fund. 33 USC 2713(c). The DAR makes no allowance for situations where the responsible party (or responsible party and guarantor) denies all liability immediately. Moreover, OPA does not "require" that claims be submitted to the guarantor at all. 33 USC 2713(a). The DAR appears to create the requirement that before a claimant may proceed to court against the responsible party or present a claim against the Fund, the claimant must present a claim to the guarantor and wait at least 45 days. We believe that in an effort to regulate the steps necessary for a claimant to proceed directly against a guarantor, the DAR inadvertently creates independent substantive legal requirements beyond those mandated by OPA, as amended.

4. Section 253.51(c) of the DAR should be stated as an "election" of remedies. We suggest adding the words, "elect to", after the words "you may:". We also suggest that Section 253.51(c)(1) be rewritten to state, " (1) start a judicial action against the responsible party or, where consistent with 253.53(b)(2), against the guarantor;". In light of this change, we would eliminate 253.51(c)(2).

5. In respect of Section 253.51(d) of the DAR, we assume that, if requested, MMS will certify to the NPFC that the statutory conditions precedent to direct action against the guarantor have been satisfied. This will be necessary to determine the extent of claimants' attempts to resolve claims before coming to the Fund, and to allow the United States to seek appropriate relief for claims paid by the Fund.

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6. Section 253.51(e) should be conformed to OPA. As noted above, where a responsible party or guarantor deny all liability, OPA does not require a 90 day waiting period. The 90 day period is an "outside" deadline for settlement of claims, beyond which a claimant may elect to pursue court action. If the claim is denied at the outset, however, no further waiting is necessary before claimants may make an election of remedies.

7. In respect of Section 253.53, we suggest changing the first sentence to read, "This section explains the circumstances in which a claim under Section 1016(f)(2) of OPA may be asserted directly against a guarantor". We would strike the words, "You must accept direct action for" in both Section 253.53(a) and (b) of the DAR, and begin each subsection with, "Any claim".

8. In Section 253.53(a), we would strike as unnecessary the words "if you provided a guaranty to a designated applicant for a COF identified as the source of an incident under 33 CFR Part 136". Likewise, we suggest striking subsection 253.53(b)(1).

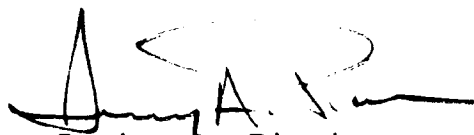
9. In respect of Section 253.53(2), we suggest changing "designated applicant" to "responsible party" (as we would throughout the regulation). We also would reference the definition of "insolvency" in 11 USC 101(32) in subsection 253.53(2)(i), in accordance with OPA, as amended.

10. We suggest striking subsection 253.53(c) because OPA does not require responsible parties or guarantors to pay within a certain period of time; it merely allows claimants to make an election of remedies after a specified period of time (or after all liability is denied, if sooner).

11. We suggest striking subsection 253.53(d) as redundant. The election of remedies is provided in OPA and will be stated again in Section 253.51(c).

We would be pleased to discuss any of these comments and to review any revisions MMS makes to the draft rule. If you have any questions, please contact me at (703) 235-4801.

Sincerely,

A handwritten signature in black ink, appearing to read "Irving A. Pianin", with a stylized flourish at the end.

Irving A. Pianin  
Legal Counsel, NPFC  
U.S. Coast Guard